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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 1203

BORG-WARNER CORPORATION,
Petitioner,

vs.

REPUBLIC GEAR COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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March 27, 1969.

THE BUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, Borg-Warner Corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause on February 7, 1969. That judgment affirmed the denial of petitioner's motion for a judgment notwithstanding the verdict in favor of respondent and the denial of petitioner's motion for a new trial.

CITATIONS TO OPINIONS BELOW.

No opinion was written by the District Court in its denial of petitioner's motions. The opinion of the Court of Appeals for the Seventh Circuit affirming the District Court is attached hereto as Appendix A. The Memorandum Order of the District Court entered December 8, 1965 (2½ years before trial) is attached hereto as Appendix B.

JURISDICTION.

The opinion of the Court of Appeals for the Seventh Circuit was rendered on January 8, 1969. Petitioner filed a timely petition for rehearing, which was denied on February 7, 1969. The jurisdiction of this Court is invoked under Title 28 of U. S. Code § 1254 (1).

QUESTIONS PRESENTED.

Respondent's action for compensatory and punitive damages was based upon an alleged interference by Borg-Warner, a competitor of respondent, with a Brazilian license agreement between Respondent and Maquinas York S. A. and was tried before a jury in the United States District Court for the Northern District of Illinois. The jurisdiction of the district court rested upon diversity of citizenship. The jury returned a verdict in favor of respondent in the sum of $400,000 as compensatory damages but refused to award punitive damages. The trial judge denied petitioner's motion for judgment notwithstanding the verdict and for a new trial. The Court of Appeals upheld this denial on the ground that competition cannot justify inducing breach of contract and that no specific intent or predatory conduct is required under Illinois law of unfair competition to make inducement tortious. The Court of Appeals also reversed a pretrial order, upon which petitioner relied during trial, requiring that Brazilian law of damages apply to interference with the Brazilian contract. The questions presented are:

(1) Whether Illinois law of inducing breach of contract as interpreted by the Seventh Circuit below, conflicts with federal antitrust policy by making ordinary competition tortious.

(2) Whether the failure of the Court of Appeals to apply Brazilian law of damages deprived petitioner of a fair trial on damages by violating the requirement in diversity cases that federal courts follow state conflict of law rules, and by failing to adhere to pre-trial rulings as to the applicable law on which petitioner relied.

STATUTES INVOLVED.

The statutes involved are the Antitrust Laws, Title 15 USC, Chapters 1 and 2 (15 USC § 1-58), the pertinent sections of which are:

§ 1. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

§ 2. "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

§ 45. "(a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

STATEMENT OF THE CASE.

The facts pertinent to the issues before this Court are not in substantial dispute.

This petition arises out of an action for inducement of breach of contract brought against petitioner Borg-Warner Corporation (Borg-Warner) by a competitor in the replacement automobile gear market, respondent Republic Gear

Company (Republic). The action resulted in a jury verdict of $400,000 which was affirmed on appeal by the Court of Appeals for the Seventh Circuit.

The contract, allegedly breached as a result of petitioner's inducement, was a license agreement for a term of fifteen years executed July 5, 1955 between Republic and Maquinas York S. A. (York), a Brazilian company engaged in the manufacture and sale of replacement gears in Brazil. This contract gave York the exclusive right to "manufacture and sell the Republic line" in Brazil under the Republic trademark, subject to stated royalty payments to Republic's bank account in Brazil, in Brazilian cruzeiros. The contract obligated Republic to provide York with manufacturing drawings and technical information "with respect to products in the Republic line which York desires to manufacture."

The Republic-York agreement became a source of controversy between the contracting parties from the very outset of its operation. Republic took the position that the agreement entitled it to royalties on all replacement gears manufactured and sold by York, including gears for non-American cars which were not a part of the Republic line. York disagreed with this interpretation of the agreement, thus precipitating a continuing dispute as to the amount of royalties due under the agreement.

Republic took the position that it had no obligation to provide technical information on items in the "Republic line" which were actually manufactured for Republic by other gear manufacturers. York contended that Republic had represented that Republic itself made all the gears which it sold in the "Republic line." Hence, York found itself repeatedly unable to get technical information on many gears covered by the exclusive arrangement with Republic. After March, 1958, Republic refused to provide further technical data until York paid the royalties Re-

public demanded. After March, 1958, no further technical information was furnished. After June, 1958, York made no royalty payments.

In late July, 1958, Mr. Rombauer, an officer of York, went to Borg-Warner's offices in Chicago, to discuss possible equity investment (as opposed to a license agreement) in York by Borg-Warner for transmission manufacture. (Republic did not manufacture transmissions, nor did the Republic-York license cover transmissions.) Mr. Rombauer brought up and mentioned the Republic-York contract, told Mr. Kight of Borg-Warner that York had been having difficulties with the contract, that the contract was at that time terminable by York, that it was not related to what they were discussing and was no impediment to a Borg-Warner-York contract.

In December, 1958, Mr. Pusset (of York) and Mr. Rombauer came to America and separately visited both Republic and Borg-Warner. Neither Republic nor Borg-Warner was aware of the visit by these men with the other. In a "brief and unpleasant" meeting, York and Republic fought about payments of royalties. In an all day meeting in Chicago with Borg-Warner to discuss transmission manufacture, Rombauer of York again mentioned the Republic contract and told Burnstan (of Borg-Warner) and Kight, that the contract was about to be "rescinded" or "terminated". Discussions about transmission manufacture ended in February, 1959 when Borg-Warner concluded that the market was inadequate to justify capital investment.

During 1959 the Republic-York disputes continued. Commencing in July, 1959, Borg-Warner and York began to discuss possible arrangements under which York would produce Borg-Warner gears under license, rather than an investment by Borg-Warner.

York suggested that this license (without equity participation by Borg-Warner) be broadened to include Borg-Warner transmissions and, after some further negotiations, Borg-Warner agreed to this. Between October, 1959 and March, 1960, the precise terms of a transmission license and a gear license were negotiated and on March 17, 1960, the licenses were signed by Borg-Warner and a newly formed Brazilian company, Borton, owned in part by some of the principals of York.

On December 1, 1959, York, through its New York attorney, and unknown to Borg-Warner, gave formal notice to Republic that York "regards the license agreement as terminated as of September 30, 1959."

REASONS FOR GRANTING THE WRIT.

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH FEDERAL ANTITRUST POLICY.

The relationship between federal law requiring freedom of competition and state tort liability for inducement of breach of contract is an important question of federal law which ought to be settled by this Court.

Inducement of breach of contract, as defined by the Seventh Circuit in this case, conflicts with federal antitrust policy by making ordinary competitive conduct tortious. The Court of Appeals ruled that Borg-Warner's contracting with the customer of a competitor is tortious, and that Borg-Warner was "chargeable with knowledge" that the customer had no right to terminate the Republic-York contract, even though the customer initiated the contract discussions, Borg-Warner committed no predatory or malicious act toward Republic, and the customer told Borg-Warner that its prior exclusive relationship with Republic was ended or about to be ended.

By its application of the state tort law of inducing breach of contract, the Court of Appeals restrains competition, in violence to federal antitrust statutes, by protecting exclusive contracts whose actual viability is in doubt, from non-predatory competitive acts of a third party, committed without malice.

In *Sears Roebuck & Co.* v. *Stiffel Co.*, 376 U. S. 225, 229 (1964), this Court indicated that no state law governing unfair competition may conflict with federal laws requiring a free competitive market:

> "These laws [Federal statutes], like other laws of the United States enacted pursuant to constitutional

> authority, are the supreme law of the land. . . . When state law touches upon the area of these Federal statutes, it is 'familiar doctrine' that the Federal policy 'may not be set at naught or its benefits denied' by the state law."

In the *Stiffel* case, the Court further said, in concluding its discussion of the relationship of state and federal laws (p. 231):

> "Just as a State cannot encroach upon the federal patent laws directly, it cannot, under some other law, such as that forbidding unfair competition, give protection of a kind that clashes with the objectives of the federal patent laws."

Even as this Court there held that state law cannot conflict with the objectives of the patent laws "to promote invention while at the same time preserving free competition" (376 U. S. 225 at 230-1), so also here this Court should now hold that the state law governing inducement of breach of contract (a form of unfair competition) cannot conflict with or "touch upon" the complementary antitrust policy and antitrust statutes in favor of free competition.

What the Seventh Circuit has done here is to protect Republic's exclusive contract from competition by defining Illinois tort law of inducement of breach of contract to make entry into inconsistent contracts tortious; this state tort standard clashes with federal standards of free competition required by the antitrust laws.

A. The Seventh Circuit Makes the Right to Compete Depend on Complex Questions of Foreign Law.

In the context of international business transactions, the Seventh Circuit's definition of "inducing breach of contract" restrains competition because it is impossible to determine when competition is permitted. The Court's finding, that Borg-Warner was "chargeable with knowl-

edge" that York had no right to terminate the Republic-York contract, imposed a duty to determine a question of Brazilian law. The Court of Appeals fails to say how Borg-Warner or any competitor could discharge this duty and "know" that it could compete.

Even if Borg-Warner had sought Brazilian legal advice during negotiations, it would have been told that the contract was rescinded. At trial, a Brazilian lawyer testified that the Republic-York contract was rescinded as a matter of Brazilian law more than two years before the Borg-Warner-Borton contracts were executed. The Republic-York correspondence would have indicated a substantial dispute. Yet, under the Seventh Circuit definition of Illinois law, Borg-Warner may not approach a Republic customer (York) until Republic's contract actually expires, even though the customer is substantially dissatisfied with Republic's services, believes that it has the right to rescind, tells Borg-Warner that it has the right to rescind and is terminating the contract.

B. Exclusive Contracts Controlling a Substantial Market Are Given Unwarranted Protection.

This radical definition of the Illinois law of inducing breach of contract restrains trade by precluding competition by third parties in a substantial market in Brazil, as long as an exclusive contract remains between an initial licensor and licensee. It places on a prospective licensor a burden impossible in its practical meaning and unlawful to discharge.

This unwarranted protection for exclusive contracts, which makes the right to compete dependent on complex questions of foreign law, conflicts with the central policy of the federal antitrust laws and the federal law of unfair competition "against contracts which take away freedom of purchasers to buy in an open market." *Federal Trade*

Comm'n. v. *Brown Shoe Co.*, 384 U. S. 316, 321 (1966). *Standard Oil* v. *United States*, 337 U. S. 293 (1948); *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320 (1961).

In *Brown Shoe*, this Court held that the federal law of unfair competition forbids a businessman with a large share of the market from entering into short term contracts which substantially hurt trade with that businessman's competitors. Yet here the Court of Appeals has interpreted the State law as declaring tortious a non-malicious attempt of Borg-Warner to enter the oligopolistic Brazilian gear market, because it affected a long term contract covering the largest single manufacturer.

C. Conspiracy to Allocate Customers Is Thus Required by Illinois Tort Law.

Interpretation of state tort law to prohibit Borg-Warner's negotiating with the Brazilian firm, has much the same economic effect as if Republic and Borg-Warner had conspired to allocate customers or territories. It requires Borg-Warner, upon hearing of a prior exclusive contract, to "honor that contract" by withdrawing from the field, even though it is told and believes that the contracting parties are in substantial dispute, that rights of termination or recission have arisen under Brazilian law and the contract is being ended.

Allocation of territories or customers is so damaging to competition that it constitutes a per se violation of the antitrust laws and cannot be justified under the rule of reason, *United States* v. *Consolidated Laundries Corp.*, 291 F. 2d 563, 574, 575 (2d Cir. 1961). How can state tort law be permitted to impose a restraint with the same effect as a customer allocation?

The blockage of effective competition which the opinion below represents, is further increased by the requirement

that Borg-Warner is chargeable with knowledge about the contract terms and contract performance of its competitors. By treating the representations made by York to Borg-Warner as irrelevant, such a requirement necessarily means that a businessman must seek such information from his competitor—the other party.

If Borg-Warner learns about the contract, knows about a substantial dispute and the licensee's assertion of a right to terminate, meets with its competitor, the previous licensor, to see if it may contract with the licensee, and then breaks off negotiations with the licensee, the reasonable conclusion is that a conspiracy to allocate territory or customers was formed. In view of this Court's repeated condemnation of boycotts, customer allocations or interference with free choice of customers (*Eastern States Retail Lumber Dealers Ass'n.* v. *United States,* 234 U. S. 600 (1914)), the Court of Appeals interpretation of state law requires Borg-Warner, in order to avoid state tort liability, to commit acts which constitute all the form and substance of an antitrust conspiracy of the types outlawed. This Court has repeatedly held that a boycott is not made legal because it attempts to curb design piracy or violations of the state law of unfair competition. *Fashion Originators Guild* v. *Federal Trade Commission,* 312 U. S. 457, 465 (1941). So also, this Court should hold that State tort law may not require Borg-Warner to refuse to deal with a customer and effectively allocate markets in order to avoid liability for inducement of breach of an exclusive licensing contract, to which it is not privy, and in which a substantial dispute exists between the parties.

D. The Seventh Circuit Extended the Tort Beyond Its Customary Limits and Increased Its Anticompetitive Effect.

The tort of inducing breach of contract is inherently anti-competitive; however, the Court of Appeals interpretation of Illinois law in this case unnecessarily worsens that tendency. In accommodating tort law to antitrust policy, the Federal common law of inducing breach of contract clearly required intentional predatory or wrongful conduct to constitute a tort. *Angle* v. *Chicago, St. Paul Ry.,* 151 U. S. 1, 13 (1894). Negligent acts which effectively interfered with contractual relations were not actionable. *Robins Dry Dock* v. *Flint,* 275 U. S. 303, 309 (1927). Furthermore, under federal common law, the making of a second contract with knowledge of the first, did not make the second an actionable wrong; [the second contracting party] was "under no legal obligation to insist upon being told why the promisor declines to carry out the first contract, and was not bound to weigh these reasons and decide at his peril whether they are good or bad." *Sweeney* v. *Smith,* 167 Fed. 385, aff'd 171 Fed. 645, cert. denied 215 U. S. 600 (1909).

In cases subsequent to *Erie* v. *Tompkins,* 304 U. S. 64 (1938), other courts in delineating the tort created by state law, have continued to restrict its effect to wilful and intentional interferences, in order to protect competition and to avoid the extension of tort liability to areas destructive of competition. The case of *Zelinger* v. *Uvalde Rock Asphalt,* 316 F. 2d 47 (10th Cir. 1963), so limits the New Mexico law in order to avoid conflict with the federal laws promoting competition. State courts have likewise limited the extent of the tort. *Horth* v. *American Aggregates Corp.,* 20 Ohio Op. 76, 35 N. E. 2d 592 (1940).

The courts of Illinois have been quite conscious of the

anti-competitive problems involved. In *Doremus* v. *Hennessey,* 176 Ill. 608, 615, 52 N. E. 924, 926 (1898), the court stated:

> "Loss resulting from competition in trade, business, or occupation will not be restricted or discouraged, whether concerning property or personal service. Lawful competition that may injure the business of another, even though successfully directed to driving that other out of business, is not actionable. Nor would competition of one set of men against another set, carried on for the purpose of gain, even to the extent of intending to drive from business that other set, and actually accomplishing that result, be actionable, unless there was actual malice."

Every day, in the normal course of business, manufacturers contact would-be distributors who have existing sources of supply. This is normal competitive activity which should be lawful. In recognition, the Illinois courts developed the twin concepts of "malice" and "justification" to control unwarranted, anticompetitive extensions of the tort. In *London Guarantee Co.* v. *Horn,* 206 Ill. 493, 503, 69 N. E. 526, 530 (1904), the Court defined malice as "a wrongful act done intentionally, without just cause or excuse." By this circular definition, the Illinois courts prohibited interference by "wrongful" means such as fraud, bribery, intimidation or disparagement, but limited the tort to intentional acts and above all, permitted competition. This approach is poles apart in anti-competitive effect from the flat rejection by the Seventh Circuit of any privilege favoring competition. Instead, the traditional Illinois approach is consistent with *Philadelphia Dairy Products Inc.* v. *Quaker City Ice Cream Co.,* 306 Pa. 164, 159 Atl. 3, 5 (1932), which refused to reward relief for inducing breach of an exclusive dealing contract and stated:

> "There is no law which prevents the manufacturer of a product from selling that product to a dealer with

whom another manufacturer has an exclusive contract, known to the first manufacturer, to supply the dealer with a similar product. Any proposal of such a law would call for instant rejection as imposing an unwise and impracticable restriction on freedom of trade and competition. The ownership of property ordinarily carries with it the right of sale, and a court of equity will not restrain such sale except under circumstances not present here, even though some other person's interests might be prejudiced by that sale, as, for example, the loss of customers which may be bound to that other person by contract."

Extension of the state law created tort of inducement of breach of contract to the competitive situation here present, as sanctioned by the courts below, restricts competition, in violation of the principles of the federal antitrust laws. Further, extension of the tort to cover inducement of recission or lawful termination similarly restricts normal business competition.

II. THE COURT OF APPEALS' DECISION DEPRIVED PETITIONER OF A FAIR HEARING ON THE DAMAGE ISSUE BY CHANGING THE BURDEN OF PROOF OF FOREIGN LAW, FAILING TO FOLLOW ILLINOIS CONFLICT OF LAWS RULES AND REPUDIATING A PRE-TRIAL ORDER RELIED ON BY DEFENDANT.

Orderly conduct of international business transactions requires proper application by the federal courts of the procedural and substantive principles of conflict of laws. To encourage the early resolution of such questions in the course of litigation is so important as to call for an exercise of this Court's power of supervision. The courts below have departed so radically from the accepted and usual course of judicial proceedings as to deprive defendant of a fair trial.

The Seventh Circuit opinion in this case conflicts with

the Second Circuit's decision in *Walton* v. *Arabian American Oil Co.*, 233 F. 2d 541 (2d Cir. 1956), cert. denied 352 U. S. 872, and with applicable decisions of this Court.

To expedite the handling of judicial proceedings, the modern trend has been to encourage pre-trial resolution of disputed issues of fact and law.

Whether the Illinois courts would apply Brazilian or Illinois law of damages to the claimed interference with the Republic-York Brazilian license agreement was first raised long prior to trial in the District Court.

After consideration of extensive briefs, the District Court entered a memorandum order on December 8, 1965 (Appendix B) (two and one-half years before trial), in which the Court unequivocally ruled "that Brazilian law also applies to the question of damages." Borg-Warner prepared for trial relying upon the order.

Although foreign law is a question of fact, Republic ignored the order, and failed to introduce at the preliminary hearing on Brazilian law, or at the trial any evidence on the Brazilian law of damages, an essential part of its case.

Borg-Warner, in reliance on this Order, objected to the introduction of damage evidence and exhibits offered by Republic on the ground that there was no evidence of Brazilian law to make it relevant; did not introduce rebuttal evidence on the measure of damages; objected to the giving of damage instructions and did not argue damages to the jury, believing the burden of proof to be on plaintiff Republic.

The Court of Appeals, however, sanctioned the application of local Illinois law to the question of damages. The departure from this pre-trial decision and the denial of a new trial on damages destroys the efficacy of pre-trial proceedings. The early resolution of the conflict of laws

principles should serve to expedite the further preparation and trial. Due process and orderly progress of judicial proceedings require that advance determinations be adhered to.

The Court of Appeals also changed the burden of proof by suggesting that Borg-Warner had the duty to show that Brazilian law was different. The Court of Appeals further stated that it was "implicit" that the District Court had "abandoned" its earlier ruling despite the fact that when the question of application of Brazilian law was again presented during trial, the judge did not inform Borg-Warner of such abandonment (R. 351, 381-385) and certainly Borg-Warner did not consent to such abandonment.

A. The Seventh Circuit's Refusal to Follow the Universal Practice Governing Burden of Proof of Foreign Law Conflicts With Other Circuits and With Decisions of This Court.

Borg-Warner was prejudiced by the failure to follow the universal practice governing burden of proof of foreign law. The plaintiff's refusal to present evidence of Brazilian law of damages as required by Judge Austin's memorandum order of December 8, 1965, was a failure of proof of an essential element of plaintiff's case. The general federal rule, also followed by Illinois courts, is that foreign law is a fact to be proved and that plaintiff has the burden of proof. *Walton* v. *Arabian American Oil Co.*, 233 F. 2d 541, 545-546 (2d Cir. 1956), cert. denied 352 U. S. 872; *Cuba Railroad* v. *Crosby*, 222 U. S. 473, 479 (1912); *Christiansen* v. *William Graver Tank Works*, 223 Ill. 142, 151, 79 N. E. 97, 101 (1906). Both *Walton* and *Cuba Railroad* expressly hold that a plaintiff's tort action should be dismissed for failure to prove foreign law. Furthermore, the Court in *Walton* holds that "in countries where the com-

mon law does not prevail, our doctrines . . . may well not exist or be vastly different. Consequently, here plaintiff had the burden of showing . . ." foreign law (233 F. 2d 541, 545). This rule is in direct conflict with the Seventh Circuit which switched the burden of proof to Borg-Warner: ("Borg-Warner . . . has not shown that the Brazilian law is different.") (Opinion p. A-11.)

B. Illinois Conflict of Laws Rules Were Not Followed in This Diversity Suit.

The Seventh Circuit's ruling that Illinois law of damages applies to interference with a Brazilian contract is contrary to rule of *Klaxon Co.* v. *Stentor Mfg. Co.*, 313 U. S. 487 (1941), requiring a federal district court sitting in Illinois to apply Illinois conflict of laws rules in diversity cases. The Court of Appeals stated that under the Illinois law, the "fundamental problem was to determine the reasonably probable amounts of royalties which York would have paid." The Court ignored the fact that the royalties that York would have paid were payable in cruzeiros, in Brazil, under an obligation to be performed in Brazil, created by and subject to the Brazilian law.

Under Illinois conflict of laws rules, damages for breach of contract are governed by the law of the place of performance, which in this case is Brazil. *George* v. *Haas*, 311 Ill. 382, 143 N. E. 54 (1924); *Benedict* v. *Dakin*, 243 Ill. 384, 90 N. E. 712 (1910). The damage arising from the tort of inducement is governed by the value of the Brazilian contract because plaintiff lost the right to cruzeiros payable in Brazil under the terms of a contract governed by Brazilian law. *Watts Co.* v. *American Bond & Mortgage Co.*, 260 Mass. 599, 157 N. E. 634, 639 (1927); *Swaney* v. *Crawley*, 133 Minn. 57, 60, 157 N. W. 910, 911 (1916); *Mahoney* v. *Roberts*, 86 Ark. 130, 138, 110 S. W. 225, 228 (1906). Only Brazilian law can determine that value; to

award Republic something it could not have recovered in Brazil would permit damage unrelated to the actual breach and would encourage forum shopping.

The damages awarded for the tort of inducement of breach of contract have two elements: a compensatory element and a punitive element. Here the compensatory element is measured by what plaintiff could recover at the place of performance (i.e., Brazil). To give him more is punitive. Punitive damages are punishment for the tort and would perhaps be governed by Illinois law. The jury's verdict in favor of the defendant on punitive damages has ruled out any punitive award.

C. Orderly Progress of Judicial Proceedings Requires That Pre-Trial Orders Be Adhered to.

The effect of the Court of Appeals reversal of burden of proof of foreign law taken together with the "implicit" abandonment by the trial judge of an express written pre-trial order deprived defendant Borg-Warner of a fair trial on the question of damages. It is clear that Borg-Warner relied on the pre-trial order in handling the question of damages. The entire concept of pre-trials and pre-trial orders is that the order when entered "controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice." FRCP 16. *Life Music, Inc.* v. *David Edelstein,* 309 F. 2d 242 (2d Cir. 1962). Further, the guidelines which govern the handling of protracted and complex litigation provide for the identification of issues and the governing law by the Court prior to trial. 23 F. R. D. 319, 515. The District Judge considered the application of Brazilian law after extensive briefing and ruled that Brazilian law was applicable. He held a preliminary trial as to Brazilian law. Such early resolution of the conflict of laws principles serves to expedite the further prepa-

ration and trial. The Court of Appeals ruled to the contrary *ex cathedra,* without briefing, on the conflict of laws question and refused to reconsider on rehearing. Whether the Court of Appeals is right or wrong on the substantive law, it is manifestly unfair to trap Borg-Warner in the middle by retroactively changing the ruling after trial.

Due process and the orderly progress of judicial proceedings require that advance determination be adhered to (or that adequate opportunity be afforded to readjust after the rules are changed). This Court should either reverse on the merits or should order a new trial on damages.

CONCLUSION.

For the foregoing reasons, Petition for Writ of Certiorari should be granted in this case.

Respectfully submitted,

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March 27, 1969.

APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS.

For the Seventh Circuit.

September Term, 1967 — April Session, 1968

No. 16490

REPUBLIC GEAR COMPANY, *Plaintiff-Appellee,*

vs.

BORG-WARNER CORPORATION, *Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

January 8, 1969

Before CASTLE, *Chief Judge,* KILEY and FAIRCHILD, *Circuit Judges.*

FAIRCHILD, *Circuit Judge.* Action for inducement of breach of contract.[1]

Plaintiff Republic Gear Company claims that defendant Borg-Warner Corporation induced Maquinas York, a Brazilian sociedade anonima (corporation), to breach an existing contract between Republic and York. Republic was

1. Jurisdiction is founded on diversity of citizenship. The law of Illinois has been accepted as controlling except that the parties disagree whether certain issues are governed by the law of the United States of Brazil.

engaged in the sale and distribution of gears for the automobile replacement market in the United States. Most of its gears were manufactured by corporations affiliated with it. York manufactured and sold gears in Brazil. Borg-Warner manufactured and sold transmissions and gears in the United States.

The jury found against Borg-Warner and awarded $400,000 damages. Borg-Warner appealed from the judgment accordingly entered.

Republic and York made a written agreement July 5, 1955. In it Republic granted York a license to manufacture and sell the Republic line of gears in the United States of Brazil for a term of 15 years. York was given the right to sell under the trade name "Republic" and use the Republic insignia. Republic agreed not to license any other to manufacture in Brazil and to furnish York with manufacturing and quality standard information. York agreed to maintain Republic's standards of quality and to pay a royalty of 5% on all sales of Republic line items manufactured and sold by York in Brazil. York guaranteed a minimum monthly royalty. Payments were to be deposited in Republic's account at a Brazilian bank. There were provisions allowing Republic to terminate, but none allowing termination by York. York agreed not to manufacture or sell any products in the Republic line except under the name "Republic", except for sales to vehicle manufacturers for original equipment. Improvements by either party were to be disclosed to the other.

Republic began to supply information and York began to sell gears under the Republic trade name, and pay royalties. Problems developed, however. York did not pay promptly or in full the amounts of royalty claimed by Republic. York claimed that Republic failed to supply manufacturing information as promptly or as fully as the contract required. There were exchanges of correspondence

concerning these claims. There were meetings in December, 1958 and October, 1959 between officers of Republic and York.

On December 1, 1959, York's New York lawyer, Nattier, wrote a letter to Republic's lawyer, enclosing letters from York, addressed to Republic and dated October 22 and November 1. Nattier wrote, "Maquinas York states that it has ceased, as of 30 October 1959 selling gears under the Republic trademark, and regards the license agreement as terminated as of 30 September 1959". As will be seen, there are facts suggesting that just before December 1 York and Borg-Warner had reached an informal agreement for a licensing arrangement, covering transmissions as well as gears.

On March 17, 1960 Borg-Warner and an affiliated corporation made written agreements with Industria Automobilistica Borton, S. A., a Brazilian corporation. By one of the agreements Borg-Warner granted Borton the exclusive right to manufacture Warner gears in Brazil, together with non-exclusive rights such as the use of the Warner trademark. Borton agreed to make a lump sum initial payment and additional payments dependent on the volume of sales. The other agreement was similar, but covered two types of transmission.

Borton was a sociedade anonima or corporation, newly created and chosen by the executives of York to be the licensee in the agreements with Borg-Warner.

There were contacts, and, at times, negotiations, between executives of Borg-Warner and York from time to time in 1955, 1958, and 1959. York was interested in an arrangement concerning manufacture of transmissions in Brazil, items not covered by the Republic agreement. On October 14 or 19, 1959 Borg-Warner proposed an agreement pertaining only to gears. It indicated the license on transmissions was still under study. York prepared its termi-

nation letters of October 22 and November 1, but Nattier, York's lawyer, did not deliver them to Republic at that time. On November 17, Borg-Warner's representative wrote to York's lawyer, Nattier, that proceeding with a license on transmissions had been approved. The jury could properly infer that this approval triggered York's repudiation, on December 1, of its agreement with Republic.

Borg-Warner had learned in 1955 that York had an agreement with Republic, valid for 15 years. There was no direct evidence that the Borg-Warner people saw the Republic agreement or were told that it had not been terminated. There was testimony that the York people represented from time to time that the Republic agreement was subject to termination, was about to be terminated, or had been terminated. Admittedly the Borg-Warner people viewed the Republic agreement as an impediment to a deal between Borg-Warner and York. In 1958, one of the Borg-Warner representatives had written to York "that we would, of course, require that the plant with whom we associated devote itself exclusively to the manufacture of our gears and not supply gears under any other brand."

We shall not attempt a detailed analysis of the facts in the voluminous record. It suffices to say that, interpreting the record most favorably to Republic, the following inferences could reasonably be drawn: York was interested in obtaining the right to manufacture Borg-Warner transmissions in Brazil; Borg-Warner was interested in having Warner gears and transmissions manufactured there; Borg-Warner would not license York to manufacture transmissions without licensing it to manufacture gears and would not do so while York had a license from Republic to manufacture gears; York would not and did not repudiate the Republic agreement until Borg-Warner assured York of gear and transmission licenses; and Borg-Warner knew

or was chargeable with knowledge that York had no right to terminate the Republic agreement.

The district court instructed the jury that Republic must prove five propositions and if it failed on any, the verdict should be for Borg-Warner. The five were:

> "First, that there was a contract in existence between plaintiff and York at the time of the defendant's act or acts which allegedly constituted the inducement;
>
> "Second, that the defendant knew of the existing contract;
>
> "Third, that the defendant induced York to breach, rescind, or terminate its contract with plaintiff;
>
> "Fourth, that York subsequently breached, rescinded, or terminated its contract with the plaintiff;
>
> "And fifth, and last, that the act or acts of the defendant were a proximate cause of the damage, if any to the plaintiff."

The verdict in favor of Republic must be deemed to embody affirmative findings on each proposition, and we conclude that there was evidence to support each finding.

We shall deal severally with the principal arguments made by Borg-Warner.

1. *Borg-Warner's conduct amounted to "Normal Business Competition".*

This contention, as others made by Borg-Warner, reflects a view of the evidence less favorable to Republic than we are required to take when Republic has won the verdict.

Borg-Warner seems really to be arguing in support of what the Restatement calls the "Privilege of Competitor": "One is privileged purposely to cause a third person not to enter into or continue a business relation with a competitor of the actor if . . ." certain conditions are fulfilled. 4 Restatement, Torts, sec. 768, subsection (1). The case before us has been found by the jury to be one of breach of con-

tract, not simply interruption of a business relation. Subsection (2) goes on to say, "The fact that one is a competitor of another for the business of a third person does not create a privilege to cause the third person to commit a breach of contract with the other even under the conditions stated in Subsection (1)."

2. *Republic failed to prove a "specific deliberate intent to harm the plaintiff and its contract with York. . . .".*

It seems clear that Borg-Warner wanted an agreement with York and anticipated substantial benefit, but would not have agreed to deal if York continued to operate under the Republic contract. Taking the view of the testimony most favorable to Borg-Warner, its people were told and may have believed in good faith that York had the right to terminate the Republic contract and had done so. It is true that there is no direct proof they received contrary information or did not hold that belief. We think, however, that from all the circumstances, including the importance of the transaction, the care which could reasonably be expected of the executives of a company the size of Borg-Warner, the length of time during which they had successive negotiations with York, and York's open and continued use of the Republic trade name, the jury could reject the testimony of the Borg-Warner people, infer that they were aware of the continued existence of the Republic contract and infer that they conditioned their dealing with York upon York's termination of its relationship with Republic.

There is no reason to suppose that Borg-Warner was motivated by a desire to injure Republic, but ill-will toward the person harmed is not essential.[2]

"The essential thing is the purpose to cause the result. If the actor does not have this purpose, his conduct does not subject him to liability under this rule even if it has the

2. Restatement, Torts, sec. 766, Comment *m*.

unintended effect of deterring the third person from dealing with the other. It is not necessary, however, that the purpose to cause the breach of contract or failure to deal be the actor's sole or paramount purpose. It is sufficient that he design this result whether because he desires it as an end in itself or because he regards it as a necessary, even if regrettable, means to some other end (See Comment *k*)."[3]

Borg-Warner argues that Illinois decisions require "a design to harm the plaintiff or to take away from the plaintiff some 'benefit' coveted by defendant." Although it has quoted language from Illinois decisions which might suggest a requirement of malice in the sense of ill will or design to harm the plaintiff,[4] this court has previously quoted with approval the following statement of Illinois law: "The essential elements of this tort [inducement to violate a contract with another] are: (1) defendant's knowledge of the existing contract; (2) the inducement; (3) the subsequent breach by the third person; and, (4) damages to the plaintiff."[5] Our study of the Illinois decisions does not lead us to the conclusion that the Illinois law requires a type of intent beyond that which would be incidental to elements (1) and (2), just quoted.

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3. Restatement, Torts, sec. 766, Comment *d*.

4. *Doremus* v. *Hennessy* (1898), 176 Ill. 608, 52 N. E. 924; *London Guarantee Co.* v. *Horn* (1903), 206 Ill. 493, 69 N. E. 526; *Milliken* v. *Hildebrand* (1924), 234 Ill. App. 276; *Pilurs* v. *Elco Construction Co.* (1958), 16 Ill. App. 2d 543, 149 N. E. 2d 104.

5. *Northern Insurance Co. of New York* v. *Doctor* (1st Dist. 1959), 23 Ill. App. 2d 225, 228, 161 N. E. 2d 867, 869, quoted in *National Gas Appliance Corp.* v. *Manitowoc Company* (7th Cir. 1963), 311 F. 2d 896, 899, fn. 5. See also: *Meadowmoor Dairies* v. *Milk Wagon Drivers' Union, etc.* (1939), 371 Ill. 377, 21 N. W. 2d 308, 314; *W. P. Iverson & Co.* v. *Dunham Manufacturing Co.* (1st Dist. 1958), 18 Ill. App. 2d 404, 152 N. E. 2d 615, 621.

3. *Allegedly erroneous rulings on evidence.*

Borg-Warner contends that a number of documents pertaining to negotiations which preceded the formation in 1955 of the agreement between York and Republic should have been admitted. The theory for their relevance is dubious at best. We do not view their exclusion as prejudicial error in any event. We also conclude that the admission of four documents challenged by Borg-Warner was not prejudicial error.

4. *Existence of the York-Republic agreement.*

Borg-Warner contends that the contract between York and Republic had ceased to exist before any dealing with Borg-Warner in 1959 which could be deemed an inducement to breach it. Borg-Warner contended, and the district court agreed, though Republic did not, that questions concerning the continuing existence of the contract must be determined by application of Brazilian law. There was a separate court trial concerning the content of Brazilian law, and Borg-Warner produced an expert. On appeal, it contends that (1) the contract was rescinded, as a matter of law, March 17, 1958 and (2) if any question of fact remained, the court did not instruct the jury properly.

On March 17, 1958, Republic wrote to York that it would not consider York's request for additional blueprints until York brought its royalty payments up to a current basis. Republic supplied no blueprints after that date. York continued to sell gears under the Republic name. It made a payment on past royalties in June, 1958, but made no payments for royalties occurring after March 17, although it appears to have recognized, at times, that they did accrue. The parties later discussed modification of the contract.

The expert testified in part that under Brazilian law "If both of the contracting parties do not fulfill their obligations, it is understood that the continuation of the contract

does not interest the parties. And their silence as to rescission may be accepted as an expression of their will, in view of their reluctance to fulfill their obligations." He expressed his own opinion that this type of rescission occurred as of March 17, 1958. We are not convinced, however, from reading his entire testimony, that the Brazilian principle of rescission by non-fulfillment compelled the conclusion, under the facts of this case, that the contract was rescinded.

We find no error in the pertinent instruction. The instruction stating the principles of law governing breach and termination was requested by Borg-Warner. The court omitted the concluding paragraph of the request, but its content was sufficiently implied or expressed elsewhere. The court refused an instruction in which an attempt was made to list the obligations which the contract imposed on the respective parties and to state the effect of the breach of any. Even if the requested instruction was correct, the failure to give it was not reversible error.

5. *The damage award.*

Borg-Warner contends that the evidence does not support the award of $400,000 damages and that errors occurred in the submission of this issue.

The jury's task was to award a number of dollars which would, as of June 16, 1967, the date of its verdict, compensate for an injury which had occurred in the fall of 1959. Borg-Warner's tort, in 1959, deprived Republic of the performance by York from month to month of a contract which would run until 1970. The cost of performance by Republic from 1959 to 1970 would have been minimal and can be disregarded. The fundamental problem was to determine the reasonably probable amounts of royalties which York would have paid from time to time from 1959 to 1970, but for the wrongful inducement, and determine the present

value, as of June, 1967, in dollars, of those periodic payments.

The jury knew the approximate level of sales and resulting royalties achieved up to late 1959. There was evidence that the number of vehicles in Brazil increased very substantially after 1959. Since the gears involved were sold for replacement purposes, the market increased, and it is reasonable to suppose that York would have sold an increasing number of gears.

Under the terms of the contract, the royalty was payable in Brazil, in cruzeiros. The value of cruzeiros in terms of dollars has fallen catastrophically. In late 1959, the exchange rate of cruzeiros for dollars was about 200 to one. At the time of trial the rate was 2,680 to one. Although Republic failed to produce statistics as to changes in the prices of commodities generally, or of gears in particular, in Brazil, it is probable that prices of gears in cruzeiros tended to increase as the dollar value of cruzeiros went down. Since the royalty was fixed in terms of percentage, the amount of royalty per unit in cruzeiros would increase with the price per unit.

It quite clearly appears that the jury award of $400,000 was based upon the proposition that if York had not been induced to repudiate, the dollar value of royalties would have averaged $3,000 per month from December 1, 1959 to June 30, 1970. Borg-Warner does not dispute the computation of Republic's counsel that $3,000 per month from December 1, 1959 to time of trial, increased by appropriate interest, plus $3,000 per month from time of trial to June 30, 1970, reduced by appropriate discount, would total $400,000. The $3,000 per month figure was probably selected because of an offer made to York by Republic in October, 1959, to modify the contract to provide a fixed royalty of $4,000 per month, subject to a 25% discount if paid within 30 days from the due date.

It can not be determined with certainty, of course, that York would have accepted this modification but for the inducement by Borg-Warner. There is evidence, however, that the dollar value of royalties accrued before December 1, 1959 averaged about $2,000 per month. Sales by York appeared to be expanding. The potential market increased substantially as time went on. The fact that the royalty obligation was measured in percentage of sales would tend to compensate for the inflation of Brazilian currency. In the light of all these factors, we conclude that fixing a dollar value of $3,000 per month on the anticipated royalties was a reasonable method of estimation whether one assumes that the offer of modification would have been accepted or not.

At one point before trial, the district court decided that the law of Brazil governed damages as well as questions of the interpretation and rescission of the contract. It is implicit, however, in the court's later actions that this point of view was abandoned. The parties appear to agree that the allegedly tortious conduct of Borg-Warner was sufficiently carried out in Illinois so that Illinois law governs in determining whether Borg-Warner's conduct subjected it to liability to Republic. We think it follows that the Illinois law governing damages also applies. Borg-Warner, contending that we must look to the law of Brazil on this subject, has not shown that the Brazilian law is different, but relies on a failure of proof by plaintiff, since Republic did not prove that Brazilian law would permit an award of damages.

Borg-Warner also appears to argue that the jury must determine the total amount of cruzeiros which would have become due to Republic under the contract and convert that amount into dollars at the exchange rate existing at the date of the verdict. *Deutsche Bank Filiale Nurnberg* v. *Humphrey* (1926), 272 U. S. 517, 47 S. Ct. 166, 71 L. Ed.

383, would appear to require that formula if this were an action by Republic against York for damages under the contract, an obligation payable in cruzeiros. This action, however, is against Borg-Warner for damage done by a tort committed in 1959 and subject to the law of Illinois. But for the tort, Republic would presumably have had the benefit of its contract as royalties became due from time to time, and it would presumably have converted the royalties received at any time in cruzeiros into dollars at the then current rate of exchange. The fact that the damages for the tort are measured by the value of the contract, and its value in turn by its probable proceeds, does not convert this action into an action to recover an obligation payable in cruzeiros.

Borg-Warner makes a number of claims of error at trial in addition to those we have specifically dealt with in this opinion. We do not find reversible error in any of them.

The judgment is affirmed.

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT.
* * (Caption—No. 63-C-543) * *

MEMORANDUM ORDER.

(Filed Dec. 8—1965.)

The Court having read the briefs on the question of the application of which laws, that of The United States of Brazil or that of Illinois, finds that in regard to the interpretation of the agreement, Exhibit A attached to Plaintiff's complaint, the law of The United States of Brazil applies. The Brazilian law will be applied to determine whether there was a breach of the agreement by either party and when and the effect thereof, whether there was a termination of the agreement by either party and when, and whether there was a breached or terminated contract at the time of the alleged tortious conduct of the defendant. The Court further finds that Brazilian law also applies to the question of damages.

The Court further finds that the law of Illinois applies to the question as to whether or not the alleged conduct of the defendant induced the breach or termination complained of and whether such conduct was in fact a tort.

The Court further sets this matter for a one-hour pretrial hearing at 9:00 a.m. on January 7, 1966 for the sole purpose of determining what the Brazilian law is. This may be done by stipulation, depositions or a hearing prior to the time of actual trial.

Dec. 8—1965

/s/ R. B. AUSTIN,
Judge.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1203

BORG-WARNER CORPORATION,

Petitioner,

vs.

REPUBLIC GEAR COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Dated: April 9, 1969.

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IN THE

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BORG-WARNER CORPORATION,

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Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Counter-Statement of Questions Presented

The U. S. District Court sitting in Illinois held, and the U. S. Court of Appeals on appeal unanimously affirmed, that the evidence was sufficient to support the jury's verdict:

(a) that petitioner had purposely caused another to breach its lawful contract with respondent, a tort in Illinois under whose conflicts rule its own law of liability concededly governs; and

(b) in accordance with the Illinois law of damages for such tort, that petitioner pay respondent compensatory damages in the sum of $400,000.

The questions presented are:

1. Is it not settled law that the antitrust statutes were not intended to, and do not, authorize restraint of such State rules and government action?

2. The Illinois conflicts rule being that Illinois law governs whether there is tort liability, did not both Courts below correctly hold that the Illinois conflicts rule requires that Illinois law also govern the damages for such tort?

3. Where the District Court had originally mistakenly ruled over respondent's objection that Brazil law would govern damages for the Illinois tort but more than a year and a quarter before the trial started, corrected that error and ruled, in accordance with respondent's contention, that Illinois law would govern damages for the Illinois tort, did not both Courts below correctly hold that that correction of error was not prejudicial to petitioner?

Counter-Statement of the Case

A. Petitioner Purposely Caused York To Repudiate The Contract Which Was Lawful Under The Antitrust Statutes. And In The District Court It Did Not Prove, And Waived, Any Alleged Immunity For That Wrong, Under The Antitrust Statutes.

Petitioner's statement of the material facts blithely ignores the substantial evidence supporting the jury verdict, much of which is referred to in or underlies the Opinion of the Court of Appeals (App. A to Pet.). The evidence and the verdict establish the following:

There was an existing license from respondent Republic to York, of which petitioner Borg-Warner had knowledge, for York's manufacture and sale in Brazil of gears under respondent's registered trade name "Republic". Petitioner wanted to use York's facilities, for its own trade name to

the exclusion of respondent's, in the Brazil gear market and petitioner knew that York was interested in a license covering both transmission and gears as much more lucrative than the license from respondent covering only gears. Petitioner therefore, at its Chicago, Illinois headquarters, purposely induced York to repudiate the license from respondent by offering it the more lucrative transmissions and gear license. This wrongful inducement was a substantial, proximate cause of York's act of repudiation, also in the United States, of its contract with respondent.

In the District Court petitioner withdrew its third affirmative defense, that the contract was illegal under the antitrust laws (App. 43, 10), and its fourth affirmative defense, that respondent was in a combination in violation of the antitrust laws (App. 43, 10). Although it did not formally withdraw its fifth affirmative defense, item (a), that it was privileged to induce York to repudiate the contract with respondent because respondent had "sought to impose upon" York a "relationship" in violation of the antitrust laws (App. 43-4), it offered no evidence in support of that defense, proposed no jury instructions respecting the same, and did not include such defense in its motions as a ground for dismissal, directed verdict, or judgment n.o.v., or for new trial.

Neither did it contend in the District Court that judgment against it for inducing breach of respondent's contract would violate the antitrust laws because it was in competition with respondent.

B. Petitioner Was On Notice For More Than 15 Months Before Trial That The Illinois Rule of Damages, Not That Of Brazil, Would Govern The Illinois Tort.

At one point before trial, on December 8, 1965, the District Court had decided, over respondent's objections, that the law of Brazil would govern damages (App. 1181, App. B to Pet.) even though both parties had agreed that the law of

Illinois determined "whether Borg-Warner's conduct subjected it to liability to Republic" (App. A to Pet., A-11).* As to this original notion that Brazil law would govern damages for an Illinois tort, the Court of Appeals held (App. A to Pet., A-11):

> "It is implicit, however, in the court's later actions that this point of view was abandoned."

This conclusion is amply borne out by the facts.

A further pre-trial hearing took place on February 11, 1966 at which there was an extended discussion of the extent to which Brazilian law would be applied and during which respondent Republic again sought to restrict its scope (App. 1196-7). The outcome of that hearing was the Order of February 11, 1966 granting the petitioner's motion for a separate trial of Brazilian law "limit[ed] . . . to the existence or non-existence of a contract at the time of the alleged tortious conduct of the defendant [petitioner]" (App. 51).

The separate trial on Brazil law commenced on June 13, 1966. At that time the District Court observed that the purpose of the hearing was to "determine whether or not there was a contract in existence that could be breached by determining what the Brazilian law in regard to contracts was" (App. 143-4). No evidence or argument was submitted at this hearing on Brazil law as to the Brazilian law of damages for the tort of inducing a breach of contract.

Trial on the merits commenced before a jury on June 5, 1967, more than 15 months after the February 11, 1966 order (App. 439). Respondent was permitted to introduce evidence on damages under Illinois law, much of it set forth or referred to in the opinion of the Court of Appeals

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* In accordance with petitioner's contention, and over respondent's objection, the existence of the contract was determined by reference to the law of Brazil (App. A to Pet., A-8-9).

(see App. A to Pet., A-9-11), over petitioner's objection based on the December 8, 1965 order (App. 601), in light of respondent's contention that the February 11, 1966 pretrial order limited the Brazilian law issue to that of existence of the contract and respondent's further contention that the parties so understood (App. 601-2).

After the jury returned its verdict of $400,000 for the respondent, petitioner moved for judgment n.o.v. or new trial. In the argument on the motion, petitioner did not deny respondent's observation that one purpose of the February 11, 1966 order was to eliminate from the case the issue of Brazilian law of damages (App. 1196-7). The District Court confirmed that observation by denying the motion for judgment n.o.v. or new trial.

Petitioner did not at any point ask for additional time to prepare a defense on damages under Illinois law, nor did it at any time make an offer of proof on the damage issue, whether under Illinois or Brazil damage law.

ARGUMENT

I. It Is Settled Law That The Antitrust Statutes Were Not Intended To, And Do Not, Prohibit State Laws Such As One Making It Tortious To Purposely Induce Repudiation Of A Lawful Contract.

A. Under *Parker* v. *Brown*, 317 U. S. 341, Petitioner's Contention, That The Decisions Below Conflict With The Antitrust Statutes, Is Without Merit.

The gist of petitioner's contention is that its causing York to repudiate respondent's contract is competition favored by the antitrust statutes and therefore may not be declared tortious; that Illinois by making that a tort has in "effect" "required" the petitioner and respondent to "conspire to allocate customers or territories" (Pet. 10). Contrary to petitioner's contention, it is settled law

that the lower courts' determination that petitioner's inducement is a tort does not restrain competition in violation of the antitrust laws. *Parker* v. *Brown,* 317 U. S. 341; *Olsen* v. *Smith,* 195 U. S. 332; *Wiggins Airways, Inc.* v. *Mass. Port Authority,* 362 F. 2d 52 (C.A. 1); *Allstate Insurance Co.* v. *Lanier,* 361 F. 2d 870 (C.A. 4).

In *Parker* v. *Brown, supra,* this Court held that in view of their "words and history", the antitrust laws "must be taken to be a prohibition of individual and not state action." 317 U. S., at 352. That case permitted California to "restrict competition among the growers and maintain prices in the distribution of their commodities to packers." 317 U. S., at 346.

A fortiori the lower courts, acting pursuant to long-established Illinois law in accordance with the prevailing common law rule, did not run afoul of the antitrust laws by adjudging that the petitioner's purposeful inducement of a breach of a lawful contract, so as to substitute itself for respondent, was tortious. Public policy favors the security of contracts, for which a party has furnished valuable consideration, against such expropriation. *Cumberland Glass Mfg. Co.* v. *De Witt,* 120 Md. 381, 87 Atl. 927, 932; *Sperry & Hutchinson Co.* v. *Louis Weber & Co.,* 161 Fed. 219, 221, 222 (N. D. Ill.); Prosser on Torts (3d ed. 1964), 954-5.

As the Supreme Court stated in holding that New York's Alcohol Beverage Control Law does not conflict with the antitrust laws, quoting an earlier case, the "teaching of this Court's decision enjoins seeking out conflicts between state and federal regulation where none clearly exists." *Joseph E. Seagram & Sons* v. *Hostetter,* 384 U. S. 35, 45. There is certainly no "clear conflict" (*id.*) between State protection of lawful contracts against private expropriation and the antitrust laws' prohibition against private monopolies and private combinations in restraint of trade.

Petitioner's reliance on *Sears Roebuck & Co.* v. *Stiffel Co.,* 376 U. S. 225, is misplaced. There the Court held that where Congress says a lamp shall not be patented, the State

may not give the owner "the equivalent of a patent monopoly" (233). Since both federal patent law and state law were in clear conflict in that case, the state law there had to give way. But since the history and language of the antitrust laws negate application to state sovereign action, the state is just as free under the antitrust laws to protect a lawful contract from purposeful inducement by a nonparty of a party's repudiation of it as it is to protect the contract directly from a party's repudiation.

B. There Was Also A Total Failure Of Proof Of Violation Of The Antitrust Statutes.

Furthermore, there was a total failure of proof in the District Court that the effect of a judgment against petitioner would be to restrain trade in interstate commerce unreasonably, in violation of the antitrust laws. Thus, for example, the contract was simply a license to use respondent's trademark in Brazil, it was concededly lawful in itself, and no showing at all was made that it was put to any use by respondent that would be condemned by the antitrust laws.

Contrary to petitioner's contentions (Pet. 9-11), the decision below did not condemn its attempt to enter into the Brazil market or to deal with York or to compete with respondent; nor did it compel any allocation of markets. It only condemned petitioner's knowing and purposeful causing of York to repudiate a lawful contract with respondent —this, of course, is no extension of the "tort beyond its customary limits" (Pet. 12) as the discussion and authorities in the Opinion of the Court of Appeals testify (App. A to Pet., A-6-7); many more cases in accord could be cited.

C. Petitioner's Point I, Not Having Been Raised In The District Court Nor Passed On There Or By The Court Of Appeals, Is Not Open Here.

As we have noted above (3), petitioner's Point I—that the common law tort of inducing a breach of con-

tract must be eliminated as in conflict with the antitrust laws, at least where inducer and victim are competitors—was not raised in the District Court nor passed on by the District Court or Court of Appeals. It is therefore not open to petitioner in this court. F.R.C.P. Rule 46; e.g., *Krock* v. *Electric Motor & Repair Co.*, 327 F. 2d 213 (C.A. 1), cert. den. 377 U. S. 934, where the Court held as follows (217):

> "The public, generally, has an interest in the speedy determination of litigation, and it is inimical to that interest not to raise until appeal what could have been considered before."

II. The Court Of Appeals' Decision Clearly Did Not Deprive Petitioner Of A Fair Hearing.

A. Since Illinois Law Concededly Determines Whether Petitioner's Conduct Is Tortious, That Law Also Governs Damages.

There is no merit to petitioner's contention (Pet. 17) that *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U. S. 487, was not followed. As noted above (3-4), the parties agreed that under the Illinois conflicts rule, Illinois' substantive law determines whether petitioner's conduct is tortious (App. A to Pet., A-11). "[I]t follows", as the Court of Appeals held (*id.*), "that the Illinois law governing damages also applies." Accord: *Bender* v. *Hearst Corp.*, 263 F. 2d 360, 365, 368 (C.A. 2); A.L.I. Restatement, *Conflict of Laws* (1934), § 412, pp. 493-4; 2 Harper & James, *Law of Torts* (1956), Sec. 30.2, p. 1687.

That "[u]nder Illinois conflict of laws rules, damages *for breach of contract* are governed by the law of performance which in this case is Brazil"—as petitioner argued, Pet. 17—is completely beside the point; the Court of Appeals pointed out (App. A to Pet., A-12):

> "This action, however, is against Borg-Warner for damage done by a tort committed in 1959 and subject

to the law of Illinois. But for the tort, Republic would presumably have had the benefit of its contract as royalties became due from time to time, and it would presumably have converted the royalties received at any time in cruzeiros into dollars at the then current rate of exchange. The fact that the damages for the tort are measured by the value of the contract, and its value in turn by its probable proceeds, does not convert this action into an action to recover an obligation payable in cruzeiros."

Accord:

Hicks v. *Guinness,* 269 U. S. 71, 80.*

B. The District Court's Correct Holding, More Than 15 Months Before Trial, That Illinois Law Would Govern Damages For The Illinois Tort, Did Not Prejudice Petitioner.

Contrary to petitioner's contentions, the Court of Appeals did not "reverse . . . a pretrial order" (Pet. 2), or "repudiat[e] a pretrial order" (Pet 14), or "retroactively chang[e] the ruling after trial" (Pet. 19). The

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* There, the Supreme Court stated the following with respect to an obligation payable in the United States and so governed by our law:

> "The American firm had a claim here . . . for damages in dollars. . . . It had a right to say . . . we want the dollars to which we have a right by the law here in force. . . . The event has come to pass upon which your liability becomes absolute as fixed by law. . . . There is no doubt that this rule prevails in actions for a tort, *Preston* v. *Prather,* 137 U. S. 604."

In our case, as in *Hicks,* respondent's claim is to damages in dollars, because the claim against petitioner is governed by our law, not that of a foreign country. In our case, no conversion in general is necessary because the obligation sued on was to compensate respondent for its loss of dollars arising out of petitioner's tort committed in Illinois.

District Court had reversed itself long before trial and the District Court and Court of Appeals found the record bare of any showing of prejudice to petitioner thereby.

As shown above (3-5), petitioner was on notice for more than 15 months before trial that the Illinois rule of damages, not that of Brazil, would govern the Illinois tort. Petitioner never asked for more time to prepare any further defense on damages and made no offer of proof in that connection.

Clearly, the District Court and the Court of Appeals were correct in holding that petitioner suffered no prejudice in connection with the timely, pre-trial determination to apply the Illinois law of damages to the Illinois tort.

C. The Decision Below Does Not Conflict With Decisions Of This And Other Courts.

Contrary to petitioner's contention (Pet. 16-17), which it seeks to bolster by a misleadingly incomplete quotation from the opinion of the Court of Appeals, that Court did not "switch . . . the burden of proof to Borg-Warner" on "foreign law" respecting the "Brazilian law of damages". The Court of Appeals answered petitioner's "conten[tion]", that it need not show the Brazil law on damages because it "relies on a failure of proof by" respondent on that issue (App. A to Pet., A-11), by holding that the Brazilian law of damages was immaterial and therefore there was no such failure of proof. Thus, the Court of Appeals held, explicitly, "that the Illinois law governing damages also applies" (App. A to Pet., A-11) and that the action is not one "to recover an obligation payable in cruzeiros" (App. A to Pet., A-12).

Since the decision of the Court of Appeals was bottomed on the immateriality of Brazil damage law, and not on any holding as to burden of proof, the decision is plainly not in conflict with the decisions petitioner cites (Pet. 16) on the burden of proving foreign law.

CONCLUSION

The petition for certiorari states no reason which could justify a review by this Court of the decision of the Court of Appeals. The petition should, therefore, be denied.

Respectfully submitted,

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